

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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PAULA ROBERTS

vs.

GARY LEASURE, et al.

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CIVIL ACTION

NO. 05-3495

**MEMORANDUM**

**ROBERT F. KELLY, Sr. J.**

**JULY 11, 2006**

Presently before me is Third-Party Defendant Robert Thompson's ("Thompson") Motion to Strike and/or Dismiss Third-Party Plaintiff Kari Van Der Weile's ("Van Der Weile") Third-Party Complaint. For the reasons set forth below, Thompson's Motion is granted.

**I. RELEVANT BACKGROUND**

Van Der Weile's third-party action against Thompson arises out of a motor vehicle accident that occurred on October 26, 2003. Van Der Weile's car was allegedly rear-ended by a truck operated by Gary Leasure ("Leasure"). Leasure was driving the truck for his employer, Mark Martin's JMAR Express, Inc. ("JMAR"). Thompson and Carolyn Blake ("Blake") were also allegedly involved in an vehicle accident approximately 280 feet in front of the Van Der Weile accident on October 26, 2003.

Van Der Weile's passenger, Paula Roberts ("Roberts"), allegedly sustained injuries in the accident and sued Leasure, JMAR, and Louis Murphy, III, on June 2, 2005. Roberts' originally filed her lawsuit in the Philadelphia Court of Common Pleas. On July 7, 2005, Roberts' lawsuit was removed to this Court. On July 21, 2005, Leasure and JMAR filed a third-party complaint against Van Der Weile. On September 9, 2005, Van Der Weile filed an answer to Leasure's and

JMAR's third-party complaint. On October 24, 2005, Van Der Weile filed a third-party complaint against Blake and Thompson and a summons was issued as to Blake and Thompson. Pennsylvania State Constable Richard Schenker unsuccessfully attempted to serve the summons upon Thompson. On December 6, 2005, Van Der Weile filed a summons returned unexecuted as to Thompson. On April 5, 2006, Van Der Weile learned of Thompson's correct address.

On May 8, 2006, Thompson moved to strike Van Der Weile's Complaint against him as untimely pursuant to Federal Rule of Civil Procedure 14(a) and/or for insufficient service pursuant to Federal Rule of Civil Procedure 4(m).

## **II. DISCUSSION**

The present Motion is governed by Federal Rule of Civil Procedure 14(a). Federal Rule of Civil Procedure 14(a) provides:

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action.

Fed. R. Civ. P. 14(a). Both Thompson and Van Der Weile admit that Van Der Weile filed her third-party complaint against Blake and Thompson after the ten day time limit in Rule 14(a). On September 9, 2005, Van Der Weile answered the third-party complaint of Leasure and JMAR. Van Der Weile's answer is the original answer for Rule 14(a) purposes. Excluding holidays and weekends, Van Der Weile had until September 23, 2005 to file her third-party complaint. Van Der Weile, however, did not file her third-party complaint against Blake and Thompson until

October 24, 2005 – well after the provisions of Rule 14(a) had expired. Furthermore, Van Der Weile did not seek leave from the Court before filing, nor did she provide notice to all parties to the action that she was filing her third party complaint. Because Van Der Weile filed her third-party complaint more than ten days after filing her original answer, pursuant to Rule 14, Van Der Weile’s third-party complaint is untimely.

Also relevant to the Court’s analysis is Local Rule 14.1(a) of the United States District Court for the Eastern District of Pennsylvania. Local Rule 14.1(a) provides:

Applications pursuant to Fed. R. Civ. P. 14 for leave to join additional parties after the expiration of the time limits specified in that rule will ordinarily be denied as untimely unless filed not more than ninety (90) days after service of the moving party’s answer. If it is made to appear to the satisfaction of the court, that the identity of the party sought to be joined, or the basis for joinder could not with reasonable diligence have been ascertained within said time period, a brief further extension of time may be granted by the Court in the interests of justice.

Local Rule 14.1(a) governs parties who do not file their third-party complaint within the ten day restriction of Federal Rule of Civil Procedure 14 and sets forth a 90-day time limit for the untimely party to file their motion for leave. Under Local Rule 14.1(a)’s 90-day time limit, Van Der Weile had until December 8, 2005, to apply to the court for leave to file her third-party complaint against Thompson. Van Der Weile, however, never filed for leave to file her third-party complaint against Thompson. Instead, Van Der Weile filed her third-party complaint against Thompson on October 24, 2005 without first obtaining leave from the Court to do so. While “it is well settled that time limits for filing a motion for leave to file a third-party complaint are not cast in stone,” Hornsby v. Johns-Manville Corp., 96 F.R.D. 367, 369 (E.D. Pa. 1982), litigants must comply with the basic edicts of both Federal Rule 14 and Local Rule 14.1(a) that once a party fails to file their third-party complaint within the ten-day restriction set

forth in Federal Rule 14, the untimely party must obtain leave from the court in order to file a third-party complaint against a third-party defendant. See Fed. R. Civ. P. 14; Local Rule 14.1(a). By failing to do so, Van Der Weile has violated both Federal Rule of Civil Procedure 14(a) and Local Rule 14.1(a).

In determining whether to permit the untimely filing of a third-party complaint, the Court should generally consider: (1) the possible prejudice to Plaintiffs; (2) the potential for complication of issues at trial; (3) the timeliness of the attempt to join third parties; and (4) the probability of trial delay. Con-Tech Sales Defined Benefit Trust v. Cockerham, 715 F. Supp. 701, 704 (E.D. Pa. 1989). Van Der Weile bears the burden of demonstrating that the delay in filing her third-party complaint was justified. Zielinski v. Zappala, 470 F. Supp. 351, 353 (E.D. Pa. 1979). After weighing these factors, as well as both sides' arguments, I find that Van Der Weile has not carried this burden.

Van Der Weile is silent on why she filed her third-party complaint after the ten-day time period expired and admits that it should have been complied with. Van Der Weile instead argues that the Court should ignore the fact that she failed to conform to Rule 14(a) because her claims were raised early enough, October 24, 2005, that no other parties were unreasonably prejudiced. I would not be unsympathetic to this argument had Van Der Weile made it in a Motion for Leave when filing her third-party complaint in October, 2005. First, neither Thompson nor Van Der Weile argue that Roberts would be prejudiced by the inclusion of Thompson and Blake. Second, although Van Der Weile does not discuss the potential for complication of the issues at trial, the inclusion of Thompson and Blake would seem to complicate issues only marginally. Van Der Weile, as a third party defendant, presumably seeks to shift at least some of the blame to the

Thompson–Blake accident that allegedly occurred 280 feet in front of Van Der Weile. Finally, although Van Der Weile admits that she attempted to join Thompson and Blake in an untimely fashion, the 31 day difference between Rule 14(a)’s deadline, September 23, 2005, and the date she filed her third-party complaint against Thompson and Blake, October 24, 2005, was regrettable but not exceedingly dilatory to the point of being prejudicial to other parties. Therefore, looking at the facts as they were on October 24, 2005, when Van Der Weile first violated Rule 14(a), her mistake was relatively innocuous.

However, the events in this litigation since October 24, 2005, lead me to the conclusion that Van Der Weile’s violation of Rule 14(a) would unfairly prejudice Thompson. Most importantly, after October 24, 2005, Van Der Weile was unable to serve Thompson with her third-party complaint and eventually violated Federal Rule of Civil Procedure 4(m)’s 120-day time limit for serving a complaint. Rule 4(m)’s relevant section provides:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specific time; provided that if the court plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m). Once again, while Van Der Weile admits that she did not serve her third-party complaint on Thompson within the time limit of Rule 4(m), she argues that she had good cause for the delay. Specifically, Van Der Weile argues that:

The facts of this case clearly warrant an extension of time to serve Mr. Thompson. . . . Attempts were made to serve him at the address provided on the police report and at an address located by a [Pennsylvania] State Constable. Inaccurate information appeared on the police report about his insurance company. Inaccurate information was provided to a [Pennsylvania] State Constable regarding his whereabouts. We even checked with the Pennsylvania [Department]

of Corrections to see if he could be located. Notices of litigation related matters have been forwarded to him. He has provided a statement to his insurance company. His insurance company has presumably been informed of the progress of this litigation because the same company insures a represented defendant in this matter. Counsel for Kari Van Der Weile, correctly or incorrectly, believed service was not an issue and was being accepted. An extension of discovery was consented to by a representative of State Farm Insurance Company on behalf of Mr. Thompson. A deposition was postponed at the request of Mr. Thompson's attorney.<sup>1</sup>

(Van Der Weile's Resp. at 21-22). Van Der Weile's version of the facts may demonstrate good cause or excusable neglect for failing to serve Thompson within Rule 4(m)'s 120-day period.<sup>2</sup> More importantly, however, Van Der Weile's argument underscores the prejudice Thompson would face by being brought into this case with a little over two months before trial. The depositions of all the parties besides Louis J. Murphy were taken before Thompson had been served with Van Der Weile's third-party complaint. The depositions of Leasure, Van Der Weile, and Blake were taken on February 28, 2006, while Roberts' deposition was taken on March 9, 2006. Thompson was not afforded the opportunity to question any of these parties. Thompson indicates that he would, at the very least, want to depose Leasure because Leasure's deposition testimony indicates that he struck Roberts' vehicle, that the Thompson-Blake accident occurred approximately 280 feet in front of the Roberts' accident, and that Leasure witnessed the

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<sup>1</sup> Thompson admits that the deposition of Louis J. Murphy, originally scheduled for April 19, 2006, was postponed at the request of his attorney and was rescheduled to May 5, 2006. At that time, Thompson notes that he had still not been served and the deposition could not be taken without waiving service. (Thompson's Reply Br. at 3).

<sup>2</sup> Notably, Thompson argues that Van Der Weile did not have good cause for failing to serve Thompson. Van Der Weile's counsel knew of Thompson's current address 20 days before Rule 4(m)'s deadline expired and made no attempt to serve Thompson at the correct address. Furthermore, there is no evidence that Thompson attempted to avoid service, nor did Van Der Weile move for an enlargement of time to serve Thompson after learning of his correct address. Because Van Der Weile's violation of Rule 4(m)'s 120-day deadline is used only to illustrate the burden Thompson presently faces by being brought into this case at such a late stage for Rule 14(a) purposes, it is unnecessary to rule on Thompson's Motion to Dismiss for lack of service pursuant to Rule 4(m).

Thompson-Blake accident.

Denying Thompson the opportunity to depose parties would impede his ability to prepare for trial. However, giving Thompson the opportunity to depose parties would delay discovery deadlines currently set to end on July 15, 2006, increase the inconvenience and cost of this litigation, and potentially push back the September 5, 2005 trial date. Rule 14(a) attempts to protect against this type of situation by requiring untimely parties to receive leave from the court before filing their third-party complaint. Van Der Weile failed to comply with Rule 14(a) and the resulting problems that followed this failure are ultimately Van Der Weile's responsibility. Although one policy underlying Rule 14 is to avoid "circuitry of action" and settle related matters in one suit, Scott v. Walter Kidde Portable Equip., Inc., No. 02-1460, 2002 U.S. Dist. LEXIS 15337, at \*1 (E.D. Pa. Aug. 12, 2002), I conclude that the factors discussed above outweigh these concerns. Accordingly, Thompson's Motion to Strike is granted.

An appropriate order follows.

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**AND NOW**, this 11th day of July, 2006, upon consideration of the Third-Party Defendant Robert Thompson's ("Thompson") Motion to Strike the Third-Party Complaint of Third-Party Plaintiff Kari Van Der Weile, and the responses thereto, it is hereby **ORDERED** that Thompson's Motion (Doc. No. 32) is **GRANTED**. The Court hereby **STRIKES** the Third-Party Complaint of Third-Party Plaintiff Kari Van Der Weile (Doc. No. 17) as to Third-Party Defendant Thompson.

BY THE COURT:

/s/ Robert F. Kelly

Robert F. Kelly,

Sr. J.